LIBRARY
SUPREME COURT, U. S.

FILED
SEP 19 197
MICHAEL RODAK, JR.,

No. 75-438

In the Supreme Court of the United States

OCTOBER TERM, 1975

POTTAWATOMIE TRIBE OF INDIANS,
THE PRAIRIE BAND OF THE
POTTAWATOMIE TRIBE OF INDIANS, et al., *Petitioner*,

vs.

THE UNITED STATES OF AMERICA, *Respondent*.

Petition for Writ of Certiorari to the United States Court of Claims

ROBERT S. JOHNSON
1108 First National Bank Tower
Topeka, Kansas 66603

Attorney of Record, for the
Pottawatomie Tribe of Indians,
The Prairie Band of the
Pottawatomie Tribe of Indians,
et al. petitioner

H. M. IVES & SONS, TOPEKA

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Treaties and Statutes Involved	3
Statement of the Case	3
(1) Background	3
(2) Reason for Non-Joinder by This Petitioner with Other Petitioners	4
(3) Best Evidence of Compensable Interest in Lands Is Treaty of 1795 and Negotiations Prior Thereto	5
(4) Award Given to Remedy Insufficiency of Treaty Consideration Should Be Divided Similar to Treaty Provisions	6
(5) Determination of Title to Other Pieces of Land, or Enclaves	6
Reasons for Granting the Writ	8
(1) The Decisions Below Conflict with the Constitutional Guarantee of the Rights of Petitioner Under the Due Process Clause and Adopts Faulty Theory of Title	8
(2) Substantial Evidence Concerning the Statements of the Parties to the Treaty Themselves Were Disregarded in Favor of Inappropriate Theories of Title Developed by the Courts Years Later	10
Conclusion	16

AUTHORITIES

Cases:

James Strong, et al. v. United States, 31 Ind. Cl. Comm. 89, decided August 9, 1973	4
James Strong, et al. v. United States, ____ Ct. Cl. ____ (1975)	2

Page

Red Lake, Pembina and White Earth Bands, et al. v. United States, 164 Ct. Cl. 389 (1964) 6

Sac & Fox Tribe v. United States, 179 Ct. Cl. 8, 383 F. 2d 991, cert. denied, 389 U.S. 900 (1967) 8

Turtle Mt. Band of Chippewa Indians v. United States, 203 Ct. Cl. 426, 490 F. 2d 935 (1974) 8

United States v. Pueblo of San Ildefonso, ____ Ct. Cl. ____ (April, 1975) 8

Statutes and Treaties:

American State Papers, Ind. Affairs, Vol. I, pp. 340-342 11

American State Papers, Ind. Affairs, Vol. I, pp. 548, 571, 574 5

American State Papers, Ind. Affairs, Vol. I, pp. 562-582, 7 Stat. 49 ..... 5, 10

Indian Cl. Comm. Act, 60 Stat. 1049 USC §705 (c) and 28 USC §1255 2

Treaty of Greeneville, August 3, 1795, 7 Stat. 44 ..... 1, 2, 3, 5, 7, 10

Treaty of Ft. Harmar, January 9, 1789, 7 Stat. 28 ..... 11, 12

Miscellaneous:

Constitution of the United States, Due Process Clause of the Fifth Amendment 8

Letter—Anthony Wayne to Secretary of War Pickering, May 15, 1795, P. 418 Def. Ex. 434 13

Vance, John, Commissioner, Indian Claims Commission, Quotation from PBS Television Broadcast (Summer, 1975) 14, 15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No.

POTTAWATOMIE TRIBE OF INDIANS,
THE PRAIRIE BAND OF THE
POTTAWATOMIE TRIBE OF INDIANS, et al., *Petitioner*,

vs.

THE UNITED STATES OF AMERICA, *Respondent*.

Petition for Writ of Certiorari to the United States Court of Claims

---

Petitioner The Pottawatomie Tribe of Indians, The Prairie Band of the Pottawatomie Tribe of Indians, et al. (recognized in the courts below as descendants of the tribe of Indians referred to in the treaty of Greeneville of August 3, 1795, 7 Stat., 49 variously as the "Putowatimes," "Potawatimes," and "Pattawatimas" and, therefore, proper parties in this treaty claim) plaintiffs in Docket 15-E in the Indian Claims Commission, pray that a writ of certiorari issue to the United States Court of Claims to review the judgment that Court rendered on June 25, 1975.

Opinions Below

The opinion of the Court of Claims, as yet unreported, rendered on June 25, 1975, on Appeal No.

1-74 from the Indian Claims Commission, is reprinted and attached as Appendix A to the petition of seven other petitioners filing a joint petition herein. The decision of the Indian Claims Commission, *James Strong, et al. v. United States*, 31 Ind. Cl. Comm. 89, dated August 7, 1973, is printed as Appendix B, and the Greeneville Treaty, included as Appendix C to the said joint petitioner's petition is filed under separate cover. This petitioner respectfully requests, in the interests of economy and minimizing the volume of the record on file in this proceeding, that such appendixes be considered as such for this petition and that Rule 23, requiring the said opinions be reprinted again with this petition, be waived.

Jurisdiction

The judgment of the Court of Claims was entered on June 25, 1975. This petition for certiorari was filed less than 90 days from the date aforesaid. Jurisdiction is invoked under §20 of the Indian Claims Commission Act, 60 Stat. 1049, 27 U.S.C. §705(c), and 28 U.S.C. §1255.

Questions Presented

1. Whether the twelve Indian Tribes which were parties to the treaty of Greeneville and which occupied and used the area referred to in this proceeding as Royce Area 11 should be denied a compensable interest in those lands under the Indian Claims Commission Act because they owned them in common, or shared such use and occupancy.

2. Whether, failing proof of exclusive use and occupancy of all or parts of Royce Area 11 by any one or more tribes, any supplemental treaty consideration found to be due as a result of the claims filed by the petitioners should be divided in that proportion of the value of the total area ceded which each claimant band's share bore to the total annuities provided for under Article 4 of the Greeneville Treaty of August 3, 1795.

3. Whether a failure to find aboriginal title in certain areas of land (Royce Areas 21, 22 and 23) should bar this petitioner from a compensable interest in these lands where there was shared use; and which lands, according to Indian spokesmen, were owned jointly by the Chippewa, Ottawa and Potawatomi.

4. Whether this petitioner should be denied a compensable interest in the lands described in the treaty as "the post of Detroit, and all the lands to the north, the west and the south of it, . . . " etc., when the evidence clearly shows that it shared the occupation and use of this area with the Wyandot, Chippewa and Ottawa and that no single tribe occupied the area exclusively.

Treaties and Statutes Involved

The treaty of Greeneville of August 3, 1795, 7 Stat. 49, is set forth as Appendix C, referred to above.

Statement of the Case

(1) Background

Certain statements were adopted by the Indian

Claims Commission as "Findings of Fact." (Findings of Fact, Opinion and Orders of the Indian Claims Commission rendered August 9, 1973, *James Strong, et al. v. United States*, 31 Ind. Cl. Comm. 89-222.) There is no argument about much of the historical background, and we will not here reiterate the same; but with some of the conclusions reached by the Commission and with which the United States Court of Claims concurred, we must take issue.

(2) Reason for Non-Joinder by This Petitioner with Other Petitioners

The reason this petitioner is not joining with the seven joint petitioners in asking for Writ of Certiorari is that the theory upon which this petitioner has sought relief both here and in the courts below is both different from and incompatible with that espoused by joint petitioners.

Unlike the joint petitioners, this petitioner did not rely upon the theories of "aboriginal title," "recognized title," or "exclusive occupancy," all of which were rejected by the Courts below as not being applicable to all of Royce Area 11; and only as to a small portion of Area 11 did the Court below find aboriginal title in the Delaware and Shawnee petitioners.

Having been denied aboriginal title to the rest of Royce Area 11, those petitioners, willing to accept what the lower Courts give them under the aboriginal title theory, now come somewhat closer to embracing the theory of this petitioner by joining the other five tribes in adopting a joint use theory.

We submit that none of these have anything like the relevancy to this treaty and to the facts leading up to it as does the theory which this petitioner has consistently pursued which may be summarized as follows:

(3) Best Evidence of Compensable Interest in Lands Is Treaty of 1795 and Negotiations Prior Thereto

The best evidence of the relative compensable interest in Royce Area 11 of the twelve Indian tribes who signed the Treaty of Greeneville is to be found in Article 4 of the treaty itself. The determination of liability should be based upon such provisions, especially since they were arrived at following a succession of treaties that were entered into with only a portion of the tribes having proper interests in the lands and that failed proper ratification; and also for the reason that no boundaries between the tribes could be established or agreed upon at the time of the treaty of 1795, and the repeated contentions of the Indians themselves that the tribes owned the lands in common. To attempt today to do what General Wayne refused, though directed by the Secretary of War, to do, namely to delineate arbitrary boundaries, is not appropriate considering the evidence presented to the Indian Claims Commission, which is not persuasive or definitive in this regard. [American State Papers, Ind. Affairs, Vol. I, pp. 562-563, Treaty of Greeneville; American State Papers, Ind. Affairs, I: 548, 571, 574.]

(4) Award Given to Remedy Insufficiency of Treaty Consideration Should Be Divided Similar to Treaty Provisions

The allowances made under Article 4 of the Treaty of August 3, 1795 which provided, inter alia, for the payment of permanent annuities of $1,000 to each of seven tribes, and $500 to each of five tribes, when read and construed with the instructions of General Anthony Wayne of April 8, 1795 and other treaty instructions and proceedings preceding the treaty, together with the often expressed concept of the Indian tribes that the lands North of the Ohio were owned as the "common property" of the several tribes, create a presumption of liability, as a matter of law, to the claimant tribes and bands, in that proportion of the value of the total area ceded, which each claimant band's share of the annuity bore to the total annuities.

Therefore, any supplemental treaty consideration found to be due as a result of the claims filed by the petitioners herein should, as a matter of law and equity, be similarly divided. [*Red Lake, Pembina and White Earth Bands, et al. v. United States*, 164 Ct. Cl. 389 (1964).]

(5) Determination of Title to Other Pieces of Land or "Enclaves" as Regards Lands Other Than Royce Area 11

This petitioner offered the Indian Claims Commission as an alternative to the adoption of a finding similar to the theory set forth in paragraph (1) above, that the Commission find a compensable interest vested in this petitioner in certain enclaves

or "pieces of land" as they are referred to under Article III of the Treaty of Greeneville of August 3, 1795. We refer specifically to items (12.) and (13.) under Article III [Treaty of Greeneville, 7 Stat. 49, August 3, 1795] which are as follows:

> "(12.) The post of Detroit and all the land to the north, the west and the south of it, of which the Indian title has been extinguished by gifts or grants to the French or English governments; and so much more land to be annexed to the district of Detroit as shall be comprehended between the river Rosine on the south, Lake St. Clair on the north, and a line, the general course whereof shall be six miles distant from the west end of Lake Erie, and the Detroit river. (13.) The post of Michillimackinac, and all the land on the island, on which that post stands, and the main land adjacent, of which the Indian title has been extinguished by gifts or grants to the French or English governments; and a piece of land on the main to the north of the island, to measure six miles on Lake Huron, or the streight between Lakes Huron and Michigan, and to extend three miles back from the water of the lake or streight, and also the island DeBois Blanc, being an extra and voluntary gift of the Chipewa nation."

The evidence fully supported this petitioner's position as set forth in paragraph (1) above; however, failing the Court's adoption of that proposition, the Commission should have found a compensable interest in the foregoing enclaves or "pieces of land" based

upon joint occupancy and possession with Wyandot, Ottawa and Chippewa petitioners.

Reasons for Granting the Writ

(1) The Decisions Below Conflict with the Constitutional Guarantee of the Rights of Petitioner That It Shall Not Be Deprived of Its Property Without Due Process of Law Under the 5th Amendment, and Adopts a Faulty Theory of Title as It Applies to the Instant Proceeding

The Court of Claims, in reaching its decision as regards the large Royce Area 11, affirms the judment of the Indian Claims Commission by refusing to find that the Indian petitioners met the proof necessary to establish "aboriginal" or "recognized" title. In doing so the Court admitted its reluctance "to discard a principle which has, in numerous cases, been held to meet the purposes and objectives of the Indian Claims Commission Act."

This conclusion was reached by the Court of Claims despite the language in the opinion that "In the past, the Court has held on several occasions that two or more tribes or groups might inhabit an area in 'joint and amicable' possession without erasing the 'exclusive' nature of their use and occupancy." [*Sac & Fox Tribe v. United States*, 179 Ct. Cl. 8, 383 F. 2d 991, cert. denied, 389 U.S. 900 (1967); *Turtle Mt. Band of Chippewa Indians v. United States*, 203 Ct. Cl. 426, 490 F. 2d 935 (1974); *United States v. Pueblo of San Ildefonso*, . . . Ct. Cl. . . . (April 1975).]

The Court then proceeds by limiting that theory to such close alliances as existed between the Sac and

Fox, instead of expanding it to the twelve tribes who were parties to this treaty of cession. It should be emphasized that this was not a treaty of friendship designed to win peace with the tribes, but a treaty of cession. Should not the term alone imply that the land to be relinquished belonged to the tribes who ceded it?

Contrary to language in the Court of Claims opinion, however, the overwhelming evidence in this case showed that there was a community of interest in the lands in Royce Area 11, and that those lands were not owned and occupied exclusively as separate lands by individual tribes.

The treaty of Greeneville, being an early treaty involving many tribes, cannot be judged with the same theories of title, i.e. "aboriginal," "recognized" as those treaties which followed many years later, when tribes had been actually removed by the United States to the confines of strict perimeters.

By refusing the theory of a commonly owned area, the lower Courts have imposed upon the Indians a capitalistic theory of ownership of land not even understood, far less adopted by the Indians; but then having imposed that theory, the Court holds that the Indian tribe may not own land with any other Indian tribe or tribes, thereby denying to the Indian the rights of joint ownership afforded to others in our capitalistic society.

No attorney or judge familiar with the evolution of the law as it applies to Indian title to land can

deny that the trend in the courts has been toward broader interpretation, more liberal to the Indians, as time passes and new law is written.

(2) Substantial Evidence Concerning the Statements of the Parties to the Treaty Themselves Were Disregarded in Favor of Inappropriate Theories of Title Developed by the Courts Years Later

That this Potawatomi petitioner had a substantial interest in the lands ceded under the treaty is evidenced by the fact that beginning in June, 1795, when Indians started arriving for the treaty, an official return taken on August 7, 1795, lists the following: 180 Wyandots, 381 Delawares, 143 Shawnees, 45 Ottawas, 46 Chippewas, 240 Potawatomis, 73 Miamis and Eel Rivers, 12 Weas and Piankashaws, and 10 Kickapoos and Kaskaskias as having been "present at and parties to the treaty of Greeneville" which, after long weeks of counseling, was signed on August 3, 1795 [Lowrie and Clarke, eds., American State Papers, Indian Affairs, Vol. 1, pp. 562-582; Dft. Ex. 31, 7 Stat. 49.]

It was the strategy of the Secretary of War to divide and conquer the confederacy of twelve tribes which gathered at Greeneville, as is made clear by one of the instructions to the Commissioners from Secretary of War Knox on April 26, 1793 prior to the treaty of 1795. "It will be an object worthy of your attention to endeavor, as far as shall be consistent with the main design of peace to form separate contracts, or treaties, relatively to boundaries, with the several tribes to whom the lands actually belong,

avoiding, as much as possible, to confirm the idea of an union or general confederacy of all the tribes, or of any patronage of the whole over the lands of any particular tribes, or subdivisions of tribes. But, as the Indians are much attached to the idea of a general confederacy, your proceedings, in these particulars, will require peculiar caution and management." [Pet. Ex. #95, Dkt 27-B, 89, 252, 335, 338 American State Papers, Vol. I, I A pp. 340-342.]

So it is the effect of the holdings of the lower courts to deny the joint ownership of Area 11 by the petitioner tribes.

This petitioner has consistently argued that the tribes owned Royce Area 11 jointly as contended by the spokesman for the tribes themselves immediately preceding the treaty, in the treaty deliberations.

Tarke (The Crane) spoke for the Wyandots, as was customary and also represented the Delawares. In doing so he approved the terms of the Fort Harmar treaty, which preceded this one but was never fully invoked, and stated that the lands belonged equally to all the Indian tribes. A fact that their current attorneys have been slow to adopt.

The spokesman for the Three Fires (Chippewas, Ottawas and Potawatomis) agreed to be bound by the same treaty but claimed their nations had land rights in the Ohio cession, for which they received no payment after 1789, as did some of the other signatory tribes.

Masses, speaking "in behalf of the three fires,

Ottawas, Chippewas, and Pattawatimies," observed that "the Wyandots were foremost at that treaty; we, the three fires, followed them." Afterward, some "foolish young men" had reclaimed the hatchet and used it against the United States. "Now," Massas declared, "[we] throw the hatchet into the middle of the great lake, where it could never again be found and taken up." Then, reverting to what had gone on at the Treaty of Fort Harmar, Massas observed that the representatives of the Three Fires had not had good interpreters at that Treaty; and, as a consequence, when they left the Treaty they were unacquainted with many of its particulars. "I was surprised," Massas told Wayne, "when I heard your voice, through a good interpreter, say that we had received presents and compensation for those lands which were . . . ceded. We, the Three Fires, were never informed of it; if . . . the Wyandots, and . . . the Delawares, have received such presents, they have kept them to themselves. I always thought that we, the Ottawas, the Chippewas, and Pattawatamies, were the true owners of those lands, but now I find that new masters have undertaken to dispose of them, so that, at this day, we do not know to whom they, of right, belong . . . " [Treaty of Ft. Harmar, Jan. 9, 1789, 7 Stat. 28.]

The Mohawk Chief Joseph Brant also espoused the concept of joint tribal ownership of these lands; and it was no secret that Secretary of War Timothy Pickering wished to destroy this concept and, therefore, suggested that the United States should fix boundary lines between the tribes.

Another fact that favors the joint occupation concept as the proper manner of resolving the interests of the several tribes under this treaty (a matter that has received far too little attention in the trial of this matter in the lower courts), is that in the view of the United States as voiced by Anthony Wayne and others in 1795, they found the "reservations round the posts, etc. . . . of much greater consequence to the interest of the United States than the proposed relinquishment of territory." [See letter from Anthony Wayne to Timothy Pickering, Secretary of War, May 15, 1795, P. 418, Def. Ex. 434.]

Let us assume hypothetically that this Court fails to grant this Writ. By so doing, and by failing to adopt the concept of joint ownership and division of the award in accordance with the proportionate share received by the tribes in the treaty proceeds, it would impose on the Indian Claims Commission the almost impossible task of valuing the military posts and nearby reservations as compared to the larger Area 11, which was used jointly by all of the tribes.

It is hardly conceivable that the Indian Claims Commission would find that the total value of these posts and reserves near them would exceed the total market value of all the land included in Royce Area 11; but if the Commission does not, they would again disregard the opinion of the agents for the United States at the time of the treaty itself.

Despite these efforts to divide the Indians in the proceedings leading up to the treaty and at the treaty itself, the Indians remained united and no boundaries

were established, it being impossible to get them to agree that they did not hold the lands in common; yet we have 180 years later some of the attorneys representing those tribes and the lower courts, attempting to do what the tribal chieftains and the Treaty Commissioners refused to do in 1795; that is, divide up the lands by establishing boundaries between the tribes.

By such presumption we demean the parties to the treaties: the Treaty Commissioners and the chiefs who were responsible for representing the tribes, who are our clients.

How much more logical and intellectually honest it is to accept the judgment of those who were on the ground in 1795 and who knew what land they used or occupied, and who agreed to the division made of the treaty proceeds under Article 4 of the treaty.

In a recent nationally televised panel discussion as a follow-up segment of "Broken Treaty at Battle Mountain" broadcast over the Public Broadcasting Service network, Commissioner John Vance, a current member of the Indian Claims Commission, in a dialogue between him and Hugh Downs, the moderator of that show, made the following statements in answer to the question posed by Mr. Downs:

> *Mr. Downs:* "When you mention aboriginal title in some way as being interpretable different from some other kind of title, isn't it pretty well established right up through the Supreme Court that wherever a treaty with the Indians exists, that the treaty is to be construed in the way that

the Indians would naturally understand it, and I can't conceive that the Indians would understand that aboriginal title was somehow different from anybody else's title."

Commissioner Vance: "Mr. Downs, if we were to be entirely candid, and we must here, there are probably not a half a dozen people in the universe that understand aboriginal title . . . "

"I think that the lawyers who are familiar with this field of law would agree that concept of aboriginal title has been of benefit to the tribes as far as recovering judgments. Whether it is a faulty concept in a particular case is a question that is open to interpretation . . " [Vance, John T., Commissioner, Indian Claims Commission, quotation from PBS Television Broadcast. Follow-up segment of "Broken Treaty at Battle Mountain" produced by Robert J. Civiello, WLIW-TV, Ellington Ave., West, Garden City, N.Y. 11530 (Summer, 1975)]

We submit that the concept of aboriginal title is a faulty concept in this particular case and that it should not have been adopted by the Indian Claims Commission to determine whether or not the twelve tribes involved in the treaty cession did or did not have a compensable interest in the ceded lands, but that rather the concept of joint and amicable possession should have been adopted.

Conclusion

For these reasons, a Writ of Certiorari to the United States Court of Claims should be granted.

Respectfully submitted,

ROBERT S. JOHNSON
1108 First National Bank Tower
Topeka, Kansas 66603
Attorney of Record for the
Pottawatomie Tribe of Indians,
The Prairie Band of the
Pottawatomie Tribe of Indians,
et al., petitioner

BERYL R. JOHNSON
Of Counsel

Certificate of Service

I hereby certify that on the 17 th day of September, 1975, all parties required to be served have been served by depositing the required copies of this "Petition for Writ of Certiorari to the United States Court of Claims" in a United States post office or mail box, with airmail postage prepaid, namely to the following:

Hon. Robert H. Bork
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Robert E. Fraley, Esq.
Lands & Natural Resources Division
Department of Justice
Washington, D.C. 20530

Robert Bell, Jr.
528 S. Main
New Canaan, Connecticut 06840

Rodney J. Edwards
800 First American National Bank Building
Duluth, Minnesota 55802

James R. Fitzharris
700 Lake Shore Drive
Escanaba, Michigan 49829

Allan Hull
6505 Wilson Mills Road
Mayfield Village, Ohio 44143

Jack Joseph
69 West Washington
Chicago, Illinois 60602

David L. Kiley
201 First National Bank Bldg.
Marion, Indiana 46952

Paul G. Reilly
Suite 1000, The Watergate 600
600 New Hampshire Ave., N.W.
Washington, D.C. 20037

Louis L. Rochmes
9800 Ashburton Lane
Bethesda, Maryland 20034

Edwin A. Rothchild
8000 Sears Tower
Chicago, Illinois 60606

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-438

POTTAWATOMIE TRIBE OF INDIANS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 75-458

HANNAHVILLE INDIAN COMMUNITY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the Indian Claims Commission and the Court of Claims erred in denying their claim for compensation based on non-exclusive possession of commonly used and occupied land.

Petitioners are two of eighteen Indian tribes or bands whose overlapping claims to the lands relin-

quished to the United States in the Treaty of Greenville of August 3, 1795, 7 Stat. 49, and prior treaties were consolidated for trial before the Indian Claims Commission.[1] A complete statement of the case is found in our Memorandum in Opposition to the petition for a writ of certiorari in a companion case, *James Strong, et al.* v. *United States,* No. 75–389.[2] The Commission awarded aboriginal title to certain lands described in the Treaty to various tribes, including an award to the Pottawatomie Tribe, which was represented by petitioner, the Prairie Band, the Citizen Band of Oklahoma, and petitioner, the Hannahville Indian Community. On interlocutory appeal, the Court of Claims affirmed, with one exception not relevant here (Strong Pet. App. A).[3] It remanded the case to the Commission for reconsideration of that issue and for a determination of the proper compensation for land regarding which aboriginal title had been recognized.

Twelve of the plaintiff tribes have previously filed a petition for a writ of certiorari to review that judgment. *Strong* v. *United States, supra,* No. 75–389. The

---

[1] Three present-day bands of Pottamatomies were found authorized to sue in a representative capacity on behalf of the tribe: Petitioner, the Prairie Band, Ind. Cl. Comm. Docket No. 15–E; the Citizen Band of Oklahoma, Ind. Cl. Comm. Docket No. 338; and petitioner, the Hannahville Indian Community, Ind. Cl. Comm. Docket No. 29–C. The Citizen Band has not filed a petition.

[2] We are serving a copy of our memorandum in that case on petitioners' counsel here.

[3] The opinion of the Court of Claims and the Findings of Fact and Opinion of the Indian Claims Commission are reproduced as Appendices A and B to the petition for a writ of certiorari in No. 75–389.

Prairie Band of Pottawatomies has filed its separate petition based upon a different legal theory concerning aboriginal title. The Hannahville Indian Community[4] argues that its claims for compensation for a larger area should have been recognized because its ancestors were granted recognized title to those lands by a proclamation of the King of England in 1763 (Hannahville Pet. App. A, pp. A.1 to A.9) and the Treaty of Greeneville.

1. Petitioner, the Prairie Band, initially contends (Pottawatomie Pet. 9–10) that the Court of Claims erred in finding that the Indian tribes parties to the Greeneville Treaty have not established aboriginal title to lands in Royce Area 11, over which no one tribe maintained actual, exclusive and continuous use and occupancy "for a long time" prior to 1795. Petitioner argues that these lands were commonly owned or jointly used and occupied by the Indian tribes and that this system of land tenure constitutes a compensable interest under the Indian Claims Commission Act. As we discussed in our Memorandum in Opposition in No. 75–389, the test of aboriginal title based on exclusive possession that was employed in this litigation has been repeatedly approved, both before and after enactment of the Act.[5] The Court of Claims properly refused to redefine that concept, which has

[4] The Eastern Miami Indian Tribe, Ind. Cl. Comm. Docket No. 130, also joins in the petition in No. 75–458. For convenience, both petitioners in that case will hereafter be referred to simply as the Hannahville Indian Community.

[5] Memorandum for the United States in Opposition, No. 75–389, p. 4.

been held to meet the purposes and objectives of the Act (Strong Pet. App. A, pp. 5–6).

The court below recognized that under the exclusive possession theory, two or more tribes can establish aboriginal title to an area if they shared the land in a close "joint and amicable" relationship (Strong Pet. App. A, pp. 6–7). See *Sac & Fox Tribe of Indians of Oklahoma* v. *United States,* 315 F. 2d 896, 903 n. 11, certiorari denied, 375 U.S. 921. However, it upheld the Commission's finding that no close and intimate political and social confederacy sufficient to invoke this exception to the general rule existed among the claimant tribes (Strong Pet. App. A, p. 7). The essential factual question whether this determination was supported by substantial evidence does not warrant further review.

Aboriginal title is not an interest protected by the Fifth Amendment [6]; petitioner's right to compensation is statutory, deriving from the Indian Claims Commission Act. Most of the litigation arising under that Act has been concluded utilizing the rules applied by the Court of Claims in this case. Petitioner has advanced no compelling arguments showing why the definition of joint occupancy sufficient to demonstrate aboriginal title should now be substantially broadened.

Petitioner also contends (Pottawatomie Pet. 3) that any compensation ultimately found to be due the plaintiffs to this litigation should be divided among them in the same proportion as each band's share bore

[6] *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 279.

to the total annuities provided under the Greenville Treaty.[7] The Indian Claims Commission never reached the question of compensation, and the Court of Claims remanded the litigation for further proceedings on that issue. Petitioner's argument is premature and not properly before the Court on interlocutory appeal.

Petitioner also contends (Pottawatomie Pet. 3) that the Court of Claims erred in finding that the Pottawatomies did not share aboriginal title to Royce Areas 21, 22 and 23 (Michigan) with two other tribes. The Commission found that since these lands were used and occupied by autonomous bands of Ottawa and Chippewa Indians prior to 1795, no single tribe, band or group possessed aboriginal title at the time of the Treaty of Greeneville (Strong Pet. App. B, pp. 33a–34a, 89a–90a). The Commission thereby implicitly concluded that there was no Pottawatomie presence in these enclaves. The Court of Claims affirmed this finding (Strong Pet. App. A, p. 20).

Petitioner further argues (Pottawatomie Pet. 6–8) that the Pottawatomies and three other tribes should have been awarded joint aboriginal title to the post of Detroit and surrounding lands ceded by the Treaty of Greeneville. The Commision found that these lands were largely occupied by non-Indians in 1795 and that none of the tribes had exclusive use or occupancy of

---

[7] Petitioner's suggestion (Pottawatomie Pet. 9) that the government's negotiation of a cession treaty with the Indian tribes conclusively established their aboriginal title to the ceded lands has been consistently rejected. *E.g.*, *Red Lake, Pembina and White Earth Bands* v. *United States*, 164 Ct. Cl. 389, 393.

these areas or maintained a continuous settlement therein (Strong Pet. App. B, pp. 33a, 86a–88a). The Court of Claims affirmed this finding (Strong Pet. App. A, pp. 21–22).

In the absence of an exceptional showing of error, this Court need not consider petitioner's challenge to the sufficiency of the evidence on these points. See, *e.g., Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275. Thus, regardless of the resolution of petitioner's common ownership argument, the Commission's findings that the Pottawatomies have no interest in these lands would be controlling.

Petitioner, the Hannahville Indian Community, contends (Hannahville Pet. 3) that the Court of Claims and the Commission erred in not finding that the proclamation of the King of England dated October 7, 1763, and the Treaty of Greeneville recognized Indian title to Royce Area 11. But both the Commission and the Court of Claims considered the question of recognized title at some length (Strong Pet. App. A, pp. 8–11) and applied the correct and settled standard. As the court below stated (Strong Pet. App. A, p. 9):

> Where Congress has by treaty or statute conferred upon the Indians or acknowledged in the Indians the right to *permanently* occupy and use land, then the Indians have a right or title to that land which has been variously referred to in court decisions as "treaty title," "reservation title," "recognized title," and "acknowledged title." As noted by the Commission, there exists no one particular form for such Congressional recognition or acknowledgment of a tribe's right

> to occupy permanently land and that right may be established in a variety of ways. * * * [*Miami Tribe of Oklahoma* v. *United States,* 175 F. Supp. 926, 936 (Ct. Cl.); emphasis in original.]

See *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272, 277–279; *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86; *Minnesota* v. *Hitchcock,* 185 U.S. 373.

Petitioner argues (Hannahville Pet. 3–4) that this well-established standard was misapplied to the facts of this case because the court below did not discuss the 1763 proclamation. But in its brief before the Court of Claims, petitioner did not rely on that proclamation or discuss its implications, beyond a single statement that "White marauding in Indian territory and settlement there caused the King of England to issue a proclamation on October 2 [sic], 1763 prohibiting all white settlement west of the Alleghenies * * *."[3]

Moreover, assuming *arguendo* that a recognition of Indian title by the King of England would have been binding on the United States, the 1763 proclamation does not even approach a grant of a *permanent* right of occupancy to petitioner's predecessors. The proclamation prohibited purchase of lands outside the colonies directly from the Indians and required removal of persons already residing there. Within the areas in which settlement had been permitted, purchases of Indian lands were to be made only by the government.

In this respect, the 1763 proclamation parallels the various trade and intercourse acts that also drew

---

[3] Brief filed for appellants in Ind. Cl. Comm. Docket Nos. 29–C and 130 in Appeal No. 1–74 before the Court of Claims, p. 4.

a line between Indian country and settled areas and forbade the purchase of land from the Indians.[9] No court has held that such legislation resulted in recognized title for all tribes west of the line, which would have included the entire western United States as it then existed. Compare *Tee-Hit-Ton Indians* v. *United States, supra,* 348 U.S. at 277–279.

The Court of Claims also properly concluded that the United States' acceptance of the cession at Greeneville was not a recognition of the Indians' title in the area ceded, but was, to the contrary, an attempt to achieve peace despite prior disputes concerning the land (Strong Pet. App. A, p. 11, Pet. App. B, p. 18a).

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

---

[9] See, *e.g.*, Act of May 19, 1873, 1 Stat. 469.

U.S. GOVERNMENT PRINTING OFFICE: 1975

SUPREME COURT, U. S.
FILED
NOV 17 1975
MICHAEL RODAK, JR., CLERK

No. 75-438

In the Supreme Court of the United States

OCTOBER TERM, 1975

POTTAWATOMIE TRIBE OF INDIANS,
THE PRAIRIE BAND OF THE
POTTAWATOMIE TRIBE OF INDIANS, et al., *Petitioner*,

vs.

THE UNITED STATES OF AMERICA, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Claims

PETITIONER'S REPLY

ROBERT S. JOHNSON
1108 First National Bank Tower
Topeka, Kansas 66603
Attorney of Record, for the
Pottawatomie Tribe of Indians,
The Prairie Band of the
Pottawatomie Tribe of Indians,
et al. petitioner

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-438

POTTAWATOMIE TRIBE OF INDIANS,
THE PRAIRIE BAND OF THE
POTTAWATOMIE TRIBE OF INDIANS, et al., *Petitioner,*
vs.
THE UNITED STATES OF AMERICA, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Claims

PETITIONER'S REPLY

Although the respondent in its "Memorandum for the United States in Opposition," Nos. 75-438 and 75-458, states that this Prairie Band Petitioner . . . "initially contends (Pottawatomie Pet. 9-10) that the Court of Claims erred in finding that the Indian tribes parties to the Greeneville Treaty have not established aboriginal title to lands in Royce Area 11 . . . " (Res. Memo., p. 3), respondent must be confused with what was contended by other petitioners. On the contrary, this petitioner contended that "the treaty of Greeneville, being an early treaty involving many tribes, cannot be judged with the same theories of title, i.e. 'aboriginal,' 'recognized' as those treaties which followed many years later, when

tribes had been actually removed by the United States to the confines of strict perimeters."

Respondent proceeds by referring to its Memorandum in Opposition in No. 75-389 and again to the test of aboriginal title, all of which is not responsive to the arguments in the Prairie Band of Pottawatomie's Petition (Res. Memo. p. 3).

Respondent then refers to the lower Court as having upheld the Commission's finding that no close and intimate political and social confederacy sufficient to invoke the exception to the general rule existed among the claimant tribes, i.e. two or more tribes can establish aboriginal title to an area if they shared the land in a close "joint and amicable" relationship (Strong Pet. App. A., pp. 6-7). See *Sac & Fox Tribe of Indians of Oklahoma v. United States*, 315 F 2d 896, 903 n. 11, certiorari denied, 375 U.S. 921. We disagree with the respondent's statement which follows: "The essential factual question whether this determination was supported by substantial evidence does not warrant further review." (Res. Memo. p. 4)

When one reads the treaty journals and the Greeneville Treaty itself, there can be little doubt that this evidence is substantial and compelling in proof of the joint and amicable relationship that existed between the signatory tribes and that the tribes felt strongly that the lands belonged in common to all of those who signed the treaty. [Lowrie and Clarke, eds., American State Papers, Indian Affairs, Vol. 1, pp. 562-582, Dft. Ex. 31, 7 Stat. 49; see also Pet. Ex. #95, Dkt

27-B, 89, 252, 335, 338 American State Papers, Vol. I, I A pp. 340-342; see also Prairie Pottawatomie Pet. pp. 10-14.]

Further on in its Memorandum, respondent falsely implies that this petitioner claims aboriginal title is protected by the Fifth Amendment (Res. Memo. p. 4). The fact is that this petitioner asserted that the Courts below by applying the faulty theory of aboriginal title to the facts in this case and by disregarding the theory of common ownership and joint and amicable possession in the tribes who ceded these lands, deprives this and other petitioners of their rights under the Fifth Amendment (Pottawatomie Pet. p. 8).

Respondent's argument that petitioner is premature in our argument about the relative compensable interest does not warrant serious consideration by this Court (Res. Memo. pp. 4-5). Respondent misses the thrust and pertinence of this petitioner's contention that the relative compensable interest in Royce Area 11 of the twelve Indian tribes who signed the Treaty of Greeneville is to be found in the treaty itself and should be divided accordingly. Respondent knows as does this Court that we are dealing in this phase of the case with the question of "title," other terms for which are "compensable interest" or "liability." The question before the Court is title in whom; or what tribes have a compensable interest, and in what proportion to one another. Therefore, the question of relative compensable interest is cer-

tainly not premature, and is properly before the Court on interlocutory appeal. It is the questions of how the land shall be valued, and the actual determination of the value of the lands that are not before this Court in the interlocutory appeal.

As regards respondent's arguments directed to this petitioner's contentions as to title in Royce Areas 21, 22 and 23 (Michigan), being three of the enclaves referred to in the treaty, respondent does little more than reiterate the finding of the lower courts (Res. Memo. pp. 5-6). No response is attempted to this petitioner's argument that by failing to adopt the concept of joint ownership which implies a division of the consideration of the lands in accordance with the treaty, an almost impossible burden will inevitably be placed on the lower courts in the next phase of this case when a method of valuation of the enclaves relative to the larger Royce Area 11 must be determined. See statement of Anthony Wayne that the reservations around the posts . . . (are) . . . "of much greater consequence to the interest of the United States than the proposed relinquishment of territory" (i.e. Royce Area 11), (Prairie Pottawatomie Pet. pp. 13-14).

It is suggested that in this case the Indian Claims Commission applied the theory of aboriginal title to a situation where it is obviously not appropriate; and to a treaty cession that because of the very early period in which is was negotiated (1795); because of the number of tribes involved; and for many other

reasons, was unique. Such a unique problem deserves a solution somewhat different from that followed by the courts in the Indian treaty claims cases of later date between only one or a few tribes. The lower courts, because of a failure to perceive this or a lack of courage, have failed to adopt the obvious and realistic solution to the problems posed by the facts.

This Court is now provided with the opportunity to resolve this issue in an equitable manner that may be easily implemented by the lower courts in resolving an otherwise almost impossible problem.

Conclusion

For the reasons stated above, as well as those stated in the Petition for Writ of Certiorari, this Petitioner prays that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

ROBERT S. JOHNSON
1108 First National Bank Tower
Topeka, Kansas 66603
Attorney of Record for the
Pottawatomie Tribe of Indians,
The Prairie Band of the
Pottawatomie Tribe of Indians,
et al., petitioner

BERYL R. JOHNSON
Of Counsel

Certificate of Service

I hereby certify that on the 14th day of November, 1975, all parties required to be served have been served by depositing the required copies of this "Petitioner's Reply" in a United States post office or mail box, with airmail postage prepaid, namely to the following:

Hon. Robert H. Bork
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Robert E. Fraley, Esq.
Lands & Natural Resources Division
Department of Justice
Washington, D.C. 20530

Robert Bell, Jr.
528 S. Main
New Canaan, Connecticut 06840

Rodney J. Edwards
800 First American National Bank Building
Duluth, Minnesota 55802

James R. Fitzharris
700 Lake Shore Drive
Escanaba, Michigan 49829

Allan Hull
6505 Wilson Mills Road
Mayfield Village, Ohio 44143

Jack Joseph
69 West Washington
Chicago, Illinois 60602

David L. Kiley
201 First National Bank Bldg.
Marion, Indiana 46952

Paul G. Reilly
Suite 1000, The Watergate 600
600 New Hampshire Avenue N.W.
Washington, D.C. 20037

Louis L. Rochmes
9800 Ashburton Lane
Bethesda, Maryland 20034

Edwin A. Rothchild
8000 Sears Tower
Chicago, Illinois 60606

ROBERT S. JOHNSON